In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1347

CUSTER CHANNEL WING CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, Custer Channel Wing Corporation ("Channel Wing") and Willard R. Custer, its president and a director, were found guilty of criminal contempt by the United States District Court for the District of Maryland (Pet. App. 53a) for violating a 1962 injunction (see Pet. App. 16a) restraining them from selling the capital stock of Channel Wing without compliance with the registration requirements of the Securities Act of 1933 (A. 4–6).[1] Channel Wing

[1] "A." refers to petitioners' appendix in the court of appeals; "R." refers to the appendix for the United States in the court of appeals; "T." refers to the transcript of hearing before the district court.

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was fined $5,000 and Custer was ordered imprisoned for 183 days (Pet. App. 53a). The court of appeals affirmed (Pet. App. 15a). Petitioners contend that the activities found to violate the injunction fell within an exemption from registration contained in Section 4(2) of the Securities Act, 15 U.S.C. 77d(2), for "transactions by an issuer not involving any public offering."

Subsequent to the injunction petitioners offered shares of Channel Wing stock to over 230 persons, selling over 1,500,000 shares to at least 163 persons scattered throughout the country (R. 36–50, 55–61, 69–70, 72–76; Pet. App. 17a, n. 1). Although more than half of the shares sold were issued in the names of three "associates", these were found to be merely "names [which] were used as conduits" for stock sales to 136 actual purchasers (Pet. App. 19a). In addition, shares were sold directly to 27 other individuals (Pet. App. 17a). Only one of all these purchasers had any association with Channel Wing other than as an investor (R. 21).

In *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 124–126, the Court held that the so-called "private offering exemption" is available only when the party claiming it sustains the burden of showing that those persons to whom the stock was offered had "access to the same kind of information that the Act would make available in the form of a registration statement."[2] Here it was found that none of the purchasers of Channel Wing

[2] See also *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461 (C.A. 2).

stock had access to that kind of information (Pet. App. 3a, 27a). The court below held that the alleged "sophistication" of the purchasers was not a substitute for "access to the kind of information which registration would disclose" (Pet. App. 3a), and that petitioners' reliance upon its use of investment letters and restrictions upon further transfers of the stock subsequent to the illegal sales was misplaced (Pet. App. 5a–6a). Such measures, the court of appeals concluded, were insufficient "to constitute the Channel Wing offering a private one in the absence of proof that the purchasers actually had access to the kind of information that a registration statement would have disclosed" (Pet. App. 6a).

The detailed statement of the facts in the district court's opinion (Pet. App. 15a–20a, 22a, 23a, 25a, 41a–52a) and the well-reasoned analyses of the precedents in that opinion (Pet. App. 21a–52a) and in the court of appeals' opinion (Pet. App. 3a–14a) make clear that the instant petition presents no issue warranting review. No question of first impression is involved here; nor is the decision below one which is "probably in conflict with applicable decisions of this Court" (Pet. 4). Both the scope of the statute and the import of the injunction were clear. As the court of appeals noted (Pet. App. 12a): "The injunction pointedly brought to the defendants' attention their past infraction of the Securities Act and laid down a specific admonitory prescription to guide their future course."[3] The court of appeals sustained the district

[3] In contrast to this sort of "specific admonitory prescription," *Connally* v. *General Construction Co.*, 269 U.S. 385, relied upon by petitioners (Pet. 4), was concerned with the construction of an ambiguous State wage-and-hour statute.

court's finding that the evidence demonstrated beyond a reasonable doubt that petitioners had full knowledge of the acts which violated the injunction and participated in such acts intentionally. The court of appeals stated: "The facts cannot possibly be fitted into the pattern of an innocent stumbling into an unintended transgression" (Pet. App. 12a). In these circumstances, the alleged violations were amply proved and petitioners' convictions were proper.

Petitioners also contend that the sentence of the individual petitioner to imprisonment for 183 days, there having been no jury trial, violates the principle this Court enunciated in *Cheff* v. *Schnackenberg,* 384 U.S. 373. This issue was not raised in the court of appeals, even though this case was before that court after the decision in *Cheff*. Accordingly, the point does not appear to be open here.[4] This issue was considered by the district court, on petitioners' motion for a reduction of penalty, after certiorari was granted in *Cheff*. The district court noted that if its sentence were reduced to less than 180 days, the individual petitioner would be ineligible for parole (T. 1599, 1603–1605), since 18 U.S.C. 4202 requires that confinement be for a definite term of more than 180 days

[4] In any event, no conflict with the *Cheff* case is necessarily involved, since a sentence of 183 days would not automatically exceed six months. Whether it would or not depends upon the date confinement begins. Any confinement of 183 days beginning in March, May, July, or most of August would not exceed six months.

for such eligibility.[5] Following this observation by the district court, petitioners' counsel withdrew the motion for a reduction of penalty (T. 1600–1601). Imposition of the 183-day sentence thus did not constitute an abuse of discretion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,
Securities and Exchange Commission.

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[5] See also 18 U.S.C. 4161, which provides an allowance for good conduct only "if the sentence is not less than six months * * *."

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